Senwara Development Sdn Bhd (now known as Bumisetia Development Sdn Bhd) v Sabah Development Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)-20–01 OF 2014
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND VARGHESE GEORGE JJCA
9 DECEMBER 2016

Contract — Privity — Exception — Whether appellant established respondent's liability under any recognised exception to doctrine of privity of contract — Whether respondent wrongfully called on performance bond when appellant fully performed its contractual obligations — Whether appellant's application to further amend re-amended statement of claim after conclusion of trial and submissions not bona fide — Whether re-amendment application sought to fundamentally change character of original suit by raising new cause of action and would have caused such prejudice to respondent that could not be compensated for by costs

The Government of Malaysia ('the government') appointed Tycoon Realty Sdn Bhd ('TR') to carry out a construction project. The contract required TR to furnish a RM1,575,000 performance bond in favour of the government. TR got the respondent to provide the bond. TR then subcontracted certain works in the project to the appellant which was required to furnish TR with a performance guarantee, also for RM1,575,000. The appellant secured the performance guarantee ('the Maybank performance bond') from Maybank Bhd ('Maybank'). To secure the credit facilities it had granted the appellant, Maybank required the appellant to, inter alia, provide an irrevocable letter of instruction ('the 16 August 1996 letter of instruction') from TR to the respondent to channel all payments due to the appellant to the appellant's Maybank account. Maybank was given a copy of that letter bearing the respondent's acknowledgement of its receipt. This arrangement was required by Maybank because TR had assigned to the respondent the whole of its rights, interests and benefits under its project agreement with the government as well as its rights under the Maybank performance bond. The project was eventually fully completed and handed over to the government. From the progress payments the respondent received from the government in respect of the project, it appropriated such sums as were due to it under the loan facilities and disbursed the remainder according to TR's instructions. It was on such instructions that the respondent forwarded nine progress payments to the appellant. The respondent also made a demand under the Maybank performance bond and was paid RM1,150,000 thereunder. The appellant sued TR and the respondent in the High Court for, inter alia, monies unpaid in

respect of work done on the project. As against the respondent, the appellant claimed it had breached the 16 August 1996 letter of instruction in failing to remit to the appellant RM6,157,207.52 in progress payments. The appellant relied upon the respondent's conduct in making the previous nine payments to assert that there had arisen an estoppel or an implied agreement that imposed a liability on the respondent to meet the appellant's claims. The appellant also pleaded that since it had fully performed its contractual obligations under the project, the respondent's call on the Maybank performance bond was wrongful and therefore the RM1,150,000 that had been paid out to the respondent should be repaid. Following a full trial and after the parties had filed their written submissions but before delivery of judgment, the appellant applied to amend its re-amended statement of claim for a third time — this time to plead that the respondent was also liable as trustee or implied trustee of monies it had received from the government. The respondent objected to the application as being not bona fide and intended to wholly change the character of the original suit such that, if the application was allowed, the respondent would suffer serious prejudice which could not be compensated for by costs as the trial and examination of witnesses was over. The High Court, dismissed the amendment application, entered judgment against TR and dismissed the claim against the respondent. The instant appeal was against both the said dismissals. The trial court held that although the respondent had acknowledged the 16 August 1996 letter of instruction, it was not a party to that document and no contract had arisen between the appellant and respondent which imposed an obligation on the respondent to pay the appellant from the progress payments it received unless it was instructed to do so by its customer, TR. The court held the nine payments the respondent forwarded to the appellant were specifically done on TR's instructions and could not give rise to any estoppel or implied agreement that the respondent would account to the appellant for all progress payments it received from the government.

Held:

(1) The 16 August 1996 letter of instruction lacked, in so far as creating an obligation directly on the respondent, an express consent from it to be bound to whatever arrangement that arose between the appellant, Maybank and TR. The trial judge rightly held that on the facts no case under the exceptions to the doctrine of privity of contract had been established by the appellant (see para 35).

(2) Shorn of any pleadings that premised the appellant's claim on express or implied trust, the appellant was precluded from mounting a case on the basis of any 'trust arrangement'. It had been found on the facts that each of the nine payments made by the respondent was based on separate instructions received from TR and not with reference to any certificate and/or progress payments in respect of the project (see para 36).

(3) The appellant had fully performed its part of the contractual obligations to complete the project. Based on the concessions that there were no demands on TR's performance bond given to the government and that there had not arisen any liability to pay damages to the government on account of TR's obligations in respect of the project works, the respondent was not entitled to make any demand on the Maybank performance bond and it was accountable to the appellant to the extent of the RM1,150,000 that it had received (see paras 38 & 44).

(4) The appellant's application to further amend the re-amended statement of claim was not made in good faith or on genuine grounds as all the related facts were well within the knowledge of and available to the appellant all along but no steps were taken earlier to amend the pleadings despite the appellant having had various opportunities to measure its own evidence and also the evidence of the respondent, if such a state of facts was required to be inferred and adjudicated upon by the court. Even the agreed issues for trial submitted by the parties did not advert to or give any indication that a case would be developed by the appellant on the basis of a 'trust' or 'implied trust' against the respondent. The attempt to further amend, made at the concluding stage of the proceedings, was clearly after objections to the appellant's submissions were raised by the respondent (see paras 19 & 21).

(5) If the re-amendment application were to be allowed it would have changed the character of the suit from what was originally pleaded and the likely prejudice that might have been caused to the respondent could not have been adequately compensated for by costs since the hearing had been completed and the respondent would have been deprived of the opportunity to cross-examine witnesses or present witnesses to dispel the notion of a trust or implied trust arising from the relationship between the parties (see paras 20 & 22).

[Bahasa Malaysia summary

Kerajaan Malaysia ('kerajaan') telah melantik Tycoon Realty Sdn Bhd ('TR') untuk menjalankan projek pembinaan. Kontrak itu menghendaki TR mengemukakan bon pelaksanaan berjumlah RM1,575,000 yang menyebelahi kerajaan. TR mendapatkan responden untuk mengemukakan bon itu. TR kemudian telah mengsubkontrakkan kerja tertentu dalam projek tersebut kepada perayu yang perlu dikemukakan kepada TR dengan jaminan pelaksanaan, juga untuk RM1,575,000. Perayu telah menyediakan jaminan pelaksanaan itu ('bon pelaksanaan Maybank') daripada Maybank Bhd ('Maybank'). Untuk menyediakan kemudahan kredit yang telah diberikan olehnya kepada perayu, Maybank menghendaki perayu untuk, antara lain, mengemukakan surat arahan yang tidak boleh ditarik balik ('surat arahan 16 Ogos 1996') dari TR kepada responden untuk menyalurkan semua bayaran yang kena dibayar kepada perayu kepada akaun Maybank perayu. Maybank

telah diberikan salinan surat tersebut yang mempunyai pengakuan responden untuk penerimaannya. Aturan ini dikehendaki oleh Maybank kerana TR telah memberikan responden keseluruhan hak, kepentingan dan faedahnya di bawah perjanjian projek dengan kerajaan dan juga haknya di bawah bon pelaksanaan Maybank. Projek itu akhirnya telah siap sepenuhnya dan diserahkan kepada kerajaan. Berdasarkan bayaran berperingkat responden yang telah diterima daripada kerajaan berkaitan projek itu, ia memperuntukkan sejumlah wang sebagaimana yang kena dibayar kepadanya di bawah kemudahan pinjaman dan mengeluarkan baki mengikut arahan TR. Ia adalah atas arahan tersebut reponden telah mengemukakan sembilan bayaran berperingkat kepada perayu. Responden juga telah membuat tuntutan di bawah bon pelaksanaan Maybank dan telah dibayar RM1,1500,000. Perayu telah menyaman TR dan responden di Mahkamah Tinggi untuk, antara lain, wang yang tidak dibayar berkaitan kerja yang dilakukan untuk projek tersebut. Terhadap responden, perayu mendakwa ia telah melanggar surat arahan 16 Ogos 1996 itu kerana gagal meremitkan kepada perayu bayaran berperingkat berjumlah RM6,157,207.52. Perayu bergantung kepada perlakuan responden dalam membuat sembilan bayaran sebelum itu untuk menegaskan bahawa wujud estopel atau perjanjian tersirat yang mengenakan liabiliti ke atas responden untuk memenuhi tuntutan perayu. Perayu juga mempli oleh kerana ia telah melaksanakan sepenuhnya obligasi kontraktualnya di bawah projek itu, dakwaan responden berhubung bon pelaksanaan Maybank itu adalah salah dan oleh itu RM1,150,000 yang telah dibayar kepada responden patut dibayar balik, berikutan perbicaraan penuh dan selepas pihak-pihak memfailkan hujah bertulis mereka tetapi sebelum penyampaian penghakiman, perayu telah memohon untuk meminda semula penyataan tuntutannya untuk kali ketiga — kali ini untuk mempli bahawa responden juga bertanggungjawab sebagai pemegang amanah atau pemegang amanah yang tersirat untuk wang yang diterimanya daripada kerajaan. Responden membantah permohonan itu sebagai suatu yang bukan suci hati dan diniatkan untuk secara menyeluruh menukar ciri guaman asal itu yang mana, jika permohonan itu dibenarkan, responden akan mengalami prejudis serius yang tidak boleh dipampas dengan kos kerana perbicaraan dan pemeriksaan saksi telah selesai. Mahkamah Tinggi, telah menolak permohonan pindaan itu, memasuki penghakiman terhadap TR dan menolak tuntutan terhadap responden. Rayuan ini adalah terhadap kedua-dua penolakan. Mahkamah perbicaraan memutuskan bahawa meskipun responden telah mengaku penerimaan surat arahan 16 Ogos 1996, ia bukan pihak kepada dokumen tersebut dan tiada kontrak wujud antara perayu dan responden untuk mengenakan obligasi ke atas responden untuk membayar perayu daripada bayaran berperingkat yang diterimanya kecuali ia telah mengarahkan untuk berbuat demikian oleh pelanggannya, TR. Mahkamah memutuskan sembilan bayaran yang telah dikemukakan oleh responden kepada perayu telah dilakukan secara spesifik atas arahan TR dan tidak boleh menimbulkan apa-apa estopel atau perjanjian tersirat bahawa responden akan

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mengambil kira perayu untuk semua bayaran berperingkat yang diterimanya daripada kerajaan.

Diputuskan:

(1) Surat arahan 16 Ogos 1996 itu tidak mempunyai, setakat mana mewujudkan obligasi secara langsung ke atas responden, persetujuan nyata daripadanya untuk mengikat kepada apa-apa aturan yang timbul antara perayu, Maybank dan TR. Hakim perbicaraan telah memutuskan sewajarnya bahawa berdasarkan fakta tiada kes di bawah pengecualian kepada doktrin priviti kontrak telah dibuktikan oleh perayu (lihat perenggan 35).

(2) Tidak dibenarkan membuat apa-apa pliding yang berasaskan tuntutan perayu berhubung amanah secara nyata atau tersirat, perayu telah dihalang daripada memulakan kes yang berasaskan apa-apa 'trust arrangement'. Ia didapati berdasarkan fakta ahawa setiap sembilan bayaran yang dibuat oleh responden berasaskan arahan berasingan yang diteriman daripada TR dan bukan dengan merujuk kepada apa-apa bayaran pengesahan dan/atau berperingkat berkaitan projek tersebut (lihat perenggan 36).

(3) Perayu telah melaksanakan sepenuhnya bahagiannya berhubung obligasi kontraktual itu untuk menyiapkan projek tersebut. Berdasarkan konsesi bahawa tiada tuntutan ke atas bon pelaksanaan TR yang diberikan kepada kerajaan dan bahawa tidak timbul apa-apa liabiliti untuk membayar ganti rugi kepada kerajaan berdasaran obligasi TR berkaitan kerja projek tersebut, responden tidak berhak untuk membuat apa-apa tuntutan ke atas bon pelaksanaan Maybank itu dan ia bertanggungjawab kepada perayu setakat RM1,150,00 yang diterimanya (lihat perenggan 38 & 44).

(4) Permohonan perayu untuk meminda selanjutnya pernyataan tuntutan itu tidak dibuat dengan nait baik atau atas alasan yang tulen kerana semua fakta berkaitan dalam pengetahuan dan tersedia kepada perayu setiap masa tetapi tiada langkah diambil terlebih dahulu untuk meminda pliding itu meskipun perayu mempunayi pelbagai peluang untuk meneliti keterangannya sendiri dan juga keterangan responden jika keadaan fakta tersebut menghendaki ia disimpulkan dan dihakimi oleh mahkamah. Walaupun isu-isu yang dipersetujui untuk perbicaraan yang dikemukakan oleh pihak-pihak tidak merujuk kepada atau memberi apa-apa tanda bahawa suatu kes akan dibuat oleh perayu atas dasar yang 'trust' atau 'implied trust' terhadap responden. Percubaan untuk selanjutnya meminda, yang dibuat pada peringkat penutup prosiding itu, adalah jelas selepas bantahan terhadap hujah perayu ditimbulkan oleh responden (lihat perenggan 19 & 21).

(5) Jika permohonan pindaan semula dibenarkan ia akan mengubah sifat guaman itu daripada apa yang dipli pada asalnya dan prejudis yang mungkin menyebabkan responden tidak diberi pampasan sewajarnya untuk kos oleh kerana perbicaraan telah selesai dan responden akan terkilan untuk peluang memeriksa balas saksi-saksi atau saksi yang hadir untuk menghapuskan tanggapan suatu amanah atau amanah tersirat yang timbul daripada hubungan antara pihak-pihak (lihat perenggan 20 & 22).]

Notes

For cases on exception, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6349–6350.

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629; [1997] 1 CLJ 361, CA (refd)

Cargill International SA and another v Bangladesh Sugar and Food Industries Corp [1998] 1 WLR 461, CA (refd)

Grant Advertising International Inc & Anor v Glaze [1968] 1 MLJ 31 (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

Pun Serge v Joy Head Investments Ltd [2010] 4 SLR 478, HC (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Appeal from: Suit No K22–158 of 2003 (High Court, Kota Kinabalu)

Norbert Yapp (Norbert Yapp & Assoc) for the appellant.
Ho Kin Kong (Ho Chong Yong) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] In the proceedings before the High Court, the appellant, who was the plaintiff, had brought a claim against two defendants. On 5 December 2013, the learned judge allowed the plaintiff to only enter judgment in the action against the first defendant and not against the second defendant. A counterclaim brought by the first defendant against the appellant/plaintiff was also dismissed by the court.

[2] On the same day, 5 December 2013, the court had also dismissed the plaintiff's application for leave to further amend its re-amended statement of claim in the matter. This application had been only filed during the closing submissions stage of the proceedings.

[3] The appellant/plaintiff being dissatisfied appealed against those parts of the learned judge's decisions, firstly, which disallowed the appellant/plaintiff's interlocutory application to further amend their re-amended statement of claim, and secondly, the dismissal of the substantive action brought against the second defendant. The second defendant was the sole respondent in this appeal.

[4] On 11 September 2014 we only allowed in part the appeal that was before us.

[5] For ease of reference and to maintain the context of the narrative, the parties will be referred to herein as they were at the High Court.

BACKGROUND

[6] The first defendant had been appointed by the Government of Malaysia ('the government') to be the developer in respect of 256 units of houses for navy personnel to be built in Sandakan (on a piece of land owned by another) ('the project').

[7] The plaintiff was engaged by the first defendant to undertake earthworks, foundation works (excluding piling) and building-construction works in respect of the project. The original letter of award thereto of 27 August 1996 was subsequently replaced by a letter of award dated 30 January 1997 ('letter of award') which confirmed the contract price payable to the plaintiff to be RM14,941,028 based on a reduced scope of works.

[8] Under the agreement with the government, the first defendant was entitled to be granted an advance payment subject however to the first defendant furnishing to the government an advance payment and performance bond to the value of RM1,575,000.

[9] It was a term in the construction contract awarded by the first defendant to the plaintiff, that the plaintiff was to furnish to the first defendant separately a performance guarantee for the same value of RM1,575,000. The letter of award however provided that the plaintiff's liability under the performance bond would in any event be limited to RM747,061.40 only.

[10] (a) The plaintiff, in order to finance the costs of the construction works,

proceeded to obtain banking facilities for itself from Maybank Bhd ('Maybank') and those facilities included a performance guarantee dated 27 August 1996 provided by Maybank in favour of the first defendant for the sum of RM1,575,000 ('Maybank performance guarantee'). A

(b) Apart from a loan facility agreement to be entered into between the plaintiff and the Maybank, Maybank required the plaintiff to provide as security for the facilities, the following: B

(i) an irrevocable letter of instruction from the plaintiff to the first defendant to directly channel all payments due to the plaintiff to the plaintiff's account with Maybank and this letter of instruction was to be acknowledged by the first defendant; and C

(ii) an irrevocable letter of instruction from the first defendant to the second defendant (Sabah Development Bank Bhd, the respondent here) to channel all payments due to the plaintiff to the plaintiff's account with Maybank and this irrevocable letter of instruction from the first defendant to the second defendant was 'to be acknowledged' by the second defendant. D

(c) On 16 August 1996, the first defendant issued the letter of instruction required under para 10(b)(ii) above to the second defendant who acknowledged its receipt. Maybank was furnished with a copy of the letter which bore the second defendant's acknowledgement of its receipt. E

[11] (a) The requirements of Maybank stated in para 10(b), in particular para 10(b)(ii) above, had come about because the first defendant had in the meanwhile separately obtained banking facilities for itself from the second defendant. These facilities included the second defendant in turn providing at the behest of the first defendant an advance payment and performance bond in the value of RM1,575,000 in favour of the government. F

(b) In addition to a loan facility agreement to be entered into by the parties, the second defendant required the first defendant to execute and provide the following: G

(i) an assignment by the first defendant of its entire benefits rights and interests in the sum of RM23,625,000 under the first defendant's agreement with the government in respect of the project; and H

(ii) an assignment by the first defendant to the second defendant of the first defendant's rights under the Maybank performance bond (that had been provided for by the plaintiff to the first defendant). I

(c) The deed of assignment dated 5 September 1996 entered into by the first defendant and second defendant satisfied para 11(b)(ii) above. Notice of assignment had been given to Maybank and it was not in dispute that subsequently pursuant to a demand made by the second defendant on the

Maybank performance bond, the second defendant had on 25 November 1996 received a sum of RM1,150,000 from Maybank.

[12] As it turned out, the project, albeit after extensions of time being duly granted, had been fully completed and handed over to the government. Between 31 July 1997 and 30 March 2000 the government had remitted 22 progress payments (including for additional works) to the second defendant amounting in total to a sum of RM24,127,598.95. The second defendant appropriated to itself such sums as were due to it under the loan facilities. Such sums as were available in excess was disbursed by the second defendant according to the instructions received from the first defendant.

[13] With regard to the letter of instruction of 16 August 1996, (paras 10(2)(b)–(c) above), only nine progress payments were made by the second defendant to the plaintiff amounting in total to the sum of RM5,339,919.79. It was the plaintiff's claim that the second defendant ought to have paid the plaintiff:

(a) a further sum of RM4,601,257.60, being the progress claims Nos 7–11 due to it; and

(b) a further sum of RM2,071,310.84 being the plaintiff's claim for additional work undertaken by the plaintiff for the first defendant on the project,

all of which sums had been received by the second defendant from the government.

[14] It was also the plaintiff's contention in the suit that the second defendant had made an improper, ineffective or wrongful demand on the Maybank performance guarantee and was therefore liable to account for and make over to the plaintiff the whole of the sums that the second defendant had received from Maybank pursuant to that impugned demand.

AMENDMENT APPEAL

[15] This action was commenced by the plaintiff on 9 September 2003 and there had been two previous amendments to the statement of claim at the instance of the plaintiff, namely on 21 May 2004 and 2 June 2004. The trial had been completed on 15 January 2008. The plaintiff's application to further amend the re-amended statement of claim had only been filed on 22 April 2008, that is, after written submissions had been filed by the plaintiff presumptively also on the basis that the second defendant was a 'trustee or implied trustee' of monies that had been received from the government. This

had drawn strong objections from the second defendant on the grounds that the submissions filed had materially departed from the pleaded case of the plaintiff.

[16] As highlighted by the learned judge, the plaintiff's pleaded cause of action against the second defendant was wholly premised on the allegation that the letter of instruction of 16 August 1996 had been breached by the second defendant. By the proposed amendments, the plaintiff was now seeking to include a new para 24A (with many subparagraphs), which when read in its entirety, had indisputably the effect of raising a further allegation that the relationship between the plaintiff, the first defendant and the second defendant was such that there existed an implied trust whereby the second defendant was constituted as a 'trustee' for the plaintiff in respect of such progress payments received from the government by the second defendant, to which the plaintiff was beneficially entitled.

[17] The learned judge, apart from taking into account (rightfully in our view) that two previous amendments had been applied for and allowed and that the present application was being brought at a late stage in the proceedings, noted that this attempt to effect further amendments to the statement of claim was being made after the closing submissions had been filed by the plaintiff, obviously '... to get around the 2nd defendant's objection ...' that 'trust' or 'implied trust' was never any part of the plaintiff's pleaded case.

[18] The learned judge acknowledged that the law did permit amendments to be made to pleadings at any stage of proceedings before the pronouncement of decision, yet was of the view that each case had to be considered on its specific surrounding facts and merits. It still had to satisfy the principles laid out judicially to be entitled to such amendments, namely, that the application was bona fide, that the prejudice likely to be occasioned to the other party (if the amendments were allowed) could be reasonably compensated by costs, and the amendments would not turn the character of the suit into a suit of another or of an inconsistent character (*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (FC)). The learned judge ruled that the plaintiff had failed to meet all the three criteria set out above.

[19] We agreed with the learned judge that the plaintiff's application to further amend the reamended statement of claim was not made in good faith or on genuine grounds as all the related facts were well within the knowledge of and available to the plaintiff all along but no steps had been taken earlier to amend the pleadings despite the plaintiff having had various opportunities to measure their own evidence, and also the evidence of the second defendant, if such a state of facts was required to be inferred and adjudicated upon by the

court. The attempt to further amend being made at this concluding stage of the proceedings was clearly after objections to the plaintiff's submission had been raised by the second defendant.

[20] As regards the issue that the likely prejudice which might be caused to the second defendant could not be adequately compensated by costs, we also agreed with the learned judge that since the hearing had been completed, the second defendant had been deprived of the opportunity to cross-examine witnesses or present witnesses to dispel the notion of a trust or implied trust arising from the relationship between the parties. We concurred with the observation of the learned judge when he went on to state:

> Even assuming for the sake of argument that the material facts on which a plea of trust or implied trust may be based was already stated in the plaintiff's pleadings, that still does not assist the plaintiff's application for amendment because the second defendant had no means of knowing that the plaintiff would rely on those same facts to mount a case based on trust or implied trust and so be able to meet that case through cross-examining the plaintiff's witnesses and its own witnesses on the matter.

[21] As pertinently pointed out by the learned judge even the agreed issues for trial submitted by the parties did not advert to or give any indication that a case will be developed by the plaintiff on the basis of a 'trust' or 'implied trust' against the second defendant.

[22] We were also in agreement with the learned judge that if the amendments were to be allowed it would amount to a change in the character of the suit as originally pleaded, namely, from imposing a direct contractual liability on the second defendant allegedly premised only on the letter of instruction of 16 August 1996, to now allow the suit to be pursued against the second defendant on the basis of a different cause of action relying on a plea supposedly that the second defendant was a 'trustee' for the plaintiff for the monies received from the government.

[23] The thrust of the plaintiff's appeal before us was however that there were precedents (*Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629; [1997] 1 CLJ 361; *Grant Advertising International Inc & Anor v Glaze* [1968] 1 MLJ 31; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9) which allowed amendments even where a new cause of action or line of defence was raised provided it was based on the same facts and arose from the same transaction involving the same parties. We however did not see how those authorities were of any assistance to the plaintiff.

[24] We need only point out that the amendments allowed in *Abdul Johari*

Abdul Rahman were before the commencement of the trial. That was also the case in *Grant Advertising* where the trial was fixed to commence on 29 June 1967 and the application to amend was presented to court on 22 May 1967. Further in *Grant Advertising* the amendments, apart from correcting some mathematical miscalculation, sought to include an alternative head of claim ('and/or under the tort of conversion and fraud' in respect of damages prayed for), which necessitated then a conversion from being brought by way a specially indorsed writ (for a specific liquidated sum) to a generally indorsed writ. More importantly, the court there in allowing the amendments also allowed to the defendant the right to file an amended defence after which the trial was to follow accordingly.

[25] The Court of Appeal in *Quah Swee Khoon* was dealing with an appeal from a decision of the High Court in a judicial review case involving an Industrial Court award. The High Court there had ruled that the Industrial Court by referring to a breach of an 'implied term of trust and confidence' had proceeded upon an unpleaded case of the claimant. The Court of Appeal (per Gopal Sri Ram JCA, as he then was) was satisfied that the pleaded case sufficiently set out the facts for what had come to be referred in industrial relations as 'constructive dismissal', and those facts were sufficient for the Industrial Court to hold that there had been a breakdown in the 'trust and confidence' between the parties. His Lordship noted as follows:

> Turning once again to the pleadings, it is abundantly clear that the appellant was complaining that he had been driven out of employment whereas the respondent was contending that the former had left of his own volition. Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily. Upon that question, the pleadings in the present instance are sufficiently precise.

The Court of Appeal in the particular circumstances obtaining there only affirmed the position that the pleadings were sufficient to uphold the award of the Industrial Court. The basic premise of the claimant's complaint and grievance vis-à-vis a breakdown in trust and confidence, had been clearly raised and pleaded there, unlike in the instant case under appeal before us. It should be noted that what was being sought by the plaintiff after the trial had been concluded was to ground its claim against the second defendant on a completely new scenario, namely, an alleged 'trust' arrangement. This case too was of no assistance to the arguments of the plaintiff.

[26] We therefore did not find any error in the exercise of the court's discretion in the particular circumstances of this case, when the learned judge dismissed the plaintiff's application for further amendment to the re-amended statement of claim. The decision of the learned judge in disallowing the further

amendments was consistent with the recognised legal principles laid down by the courts when called to exercise such a discretion as to whether to allow or disallow amendments to pleadings. Further, the exercise of the court's discretion against the plaintiff was justified on the facts and pleadings extant in this suit as explained by the learned judge.

SUBSTANTIVE CLAIM APPEAL

[27] As earlier pointed out, the plaintiff's claim against the second defendant comprised of two parts. They were:

(a) firstly, the claim for the sums of RM4,085,896.68 and a further RM2,071,310.84, from progress payments received by the second defendant, premised on the contention that there had been a breach by the second defendant of the letter of instruction dated 16 August 1996 to remit those sums to the plaintiff; and

(b) secondly, the allegation that the demand made by the second defendant on the Maybank performance guarantee pursuant to the deed of assignment dated 5 September 1996 (between the first and second defendants) was wrongful and the second defendant was liable to account to the plaintiff for the sum of RM1,150,000 received from Maybank thereto.

[28] Having gone through the judgment we summarise below the principal findings of fact arrived at by the learned judge:

(a) the relationship as between the first defendant and the second defendant was essentially that of a banker and customer, whereby the first defendant as a borrower was liable to repay the facilities extended by the second defendant as per the terms set out in the documents evidencing and surrounding the provision of the loan facilities;

(b) it was not in dispute that the second defendant did receive the letter of instruction of 16 August 1996 issued by the first defendant; there was however no requirement by the plaintiff or by Maybank at any time that the second defendant should consent to the matters therein contained;

(c) the letter of instruction of 16 August 1996 was no more than a mandate from the first defendant to the second defendant to pay to the plaintiff some sums of the progress payments received from the government. This constituted the second defendant to be an agent of the first defendant;

(d) the nine payments that had been effected by the second defendant to the plaintiff were pursuant to nine separate written instructions issued by the first defendant to the second defendant that there be specific remittances as instructed to the plaintiff from the progress payments

received by the second defendant. Such payments were not made based on any architect's or engineer's certificate for payments presented to the second defendant. On the evidence too, no progress payment certificates had been presented to the second defendant by the plaintiff before any of those nine payments were made by the second defendant;

(e) the first defendant had locus standi to issue those nine instructions since the assignment of proceeds from the project to the second defendant (pursuant to the deed of assignment of 5 September 1996) was merely as security towards repayment of the facilities extended by the second defendant to the first defendant and any payment outside the scheduled repayment was subject in any case to the residual rights of the first defendant to issue instructions thereto;

(f) the nine payments did not give rise to estoppels to impose or attach similar liability on the second defendant to account the further progress payments received from the government, purportedly under certificates for payments Nos 7–12; and

(g) it had not been put to any of the second defendant's witnesses that, in any event, there was an express or implied promise by the second defendant to independently pay the plaintiff, that is, apart from the letter of instruction of 16 August 1996.

[29] It was the learned judge's finding therefore that since the second defendant had merely acknowledged the letter of instruction of the 16 August 1996, the second defendant was not a party to that document. Therefore no contract arose on the facts between the plaintiff and the second defendant such as would have imposed an obligation on the second defendant to pay the plaintiff from the progress payments received, independent of any instruction from the first defendant. The learned judge then went on to consider the question whether in law and/or on the facts, the plaintiff had made out a case to bring itself within the recognised exceptions to the doctrine of the privity of contract (*Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170) in the specific context of the second defendant, as agent, stood possessed of monies belonging to the first defendant (as principal).

[30] The learned judge noted that the first exception was only available where funds were in the hands of an agent and the principal had properly assigned or charged the same in favour of a third party provided always that notice of such assignment or charge had been given to the agent by the principal. The letter of instruction of the 16 August 1996 did not definitely create in favour of the plaintiff such an effective assignment or charge of such monies that were likely to come into the hands of the second defendant. It was

the conclusion of the learned judge that on the findings of fact (enumerated above), the plaintiff could not in any event bring their case within this first exception.

[31] The learned judge identified the second exception to be where monies of the principal were in the hands of an agent and the agent expressly or impliedly promised a third party to pay him or to receive or hold such funds for the third party. In other words, the issue here was whether the second defendant had contracted in such a form to become personally liable to pay the plaintiff from the progress payments received from the government. Again on the finding of facts enumerated by us above, the learned judge disagreed with the contentions of the plaintiff there had come into existence any such personal obligation which required the second defendant to make over to the plaintiff the sums claimed by the plaintiff.

[32] The plaintiff had principally relied on the conduct of the second defendant in making the nine payments to assert that there had arisen an estoppel or an implied agreement in favour of the plaintiff which imposed a liability on the second defendant to meet the plaintiff's claim. The plaintiff had also contended that the reliance by the second defendant on the nine letters of instructions from the first defendant was an afterthought, dubious and a conspiracy as apparently upon enquiry by the plaintiff and/or Maybank as to the cessation of further payments they had been told that some certificates were not in place.

[33] The learned judge did not disregard these contentions of the plaintiff and suffice for us to reproduce the following extract from the judgment to show that the court did admirably analyse the evidence that was before the court before concluding that there was no merit in the plaintiff's aforementioned contentions:

> The plaintiff next contended that the 2nd defendant had actually made the 9 payments to it pursuant to the Letter of Instruction and that when the 2nd defendant stopped making the payments, upon enquiry from the plaintiff as to the reason for the stoppage, the 2nd defendant gave the reason as being the non-compliance with the condition stated in the Letter of Instruction ie no certificate signed by the Architect and the Federal Engineer, and not the lack of further independent instructions. Therefore, the plaintiff submitted that the evidence of DW1, DW2 and DW3 to the effect that the 9 payments were made to the plaintiff upon receipt of independent instructions from the 1st defendant was an afterthought, dubious and a conspiracy to avoid payment due to the plaintiff since none of the 1st Defendant's independent instructions were copied to the plaintiff or Maybank and carried out surreptitiously behind the back of the plaintiff.
>
> I find no merit in the above submission. In the first place conspiracy was not pleaded by the plaintiff. In the second place, I accept the evidence of DW1 that after the 9th

written instruction received from the 1st defendant dated 20.3.1998, the 1st defendant did not give any further instructions to remit further money to the Plaintiff's account.

According to DW1, Maybank then made enquiry in its letter of 11.7.1998 about more progress payments allegedly certified jointly by the Architect and the Federal Engineer but the 2nd defendant by letter dated 7.8.1998 informed Maybank to liase directly with the 1st defendant on the matter. On Maybank continuing to make enquiry, the 2nd defendant by letter dated 16.4.1999 informed the plaintiff that it was not aware of any such certificates. In fact it was only on 4.11.1998 which is well after the 9th payment was made that the plaintiff sent a copy of the Architects Certificates No 7 to 11 to the 2nd defendant. There is no evidence that prior to this date the 2nd defendant was furnished any progress payments duly certified, whether by the Architect alone or jointly with the Federal Engineer. I therefore find the 2nd Defendant's explanation about making the 9 payments based on independent instructions received from the 1st defendant is not an afterthought as alleged.

In the third place, I find the Plaintiff's contention that the 9 independent letters of instruction were not copied to it or Maybank is of no relevance. These were direct instructions from a customer to its banker. The 1st defendant has no obligation to extend the said instructions to the plaintiff. The 2nd defendant, a banker, not only has no obligation to do so, but owes a duty not to do so.

[34] We must note here for the record that before us counsel for the plaintiff did not seriously challenge the findings of the learned judge in respect of the essential facts surrounding this case or canvass that there had been any misdirection or non-appreciation of the evidentiary material available to the court.

[35] There were essentially two points asserted in appeal by the plaintiff. The first that the letter of instruction of 16 August 1996 was in the context of facilities obtained by the plaintiff from Maybank and not directly an incident of the banker-customer relationship between the first defendant and the second defendant. The short answer to this was that the letter of instruction of 16 August 1996 lacked, in so far as creating an obligation directly on the second defendant, an express consent from the second defendant to be bound to whatever arrangement that arose between the plaintiff, Maybank and the first defendant. This as earlier highlighted was adequately addressed by the learned judge when it was rightfully held that on the facts no case under the exceptions to the doctrine of privity of contract had been established by the plaintiff.

[36] The second point advanced by the plaintiff was that there was sufficient evidence of a 'device of trust' in the arrangements in place, and especially with the nine payments that had been directly remitted by the second defendant to the plaintiff, the second defendant was under an obligation to account for and settle the plaintiff's claims. In response, firstly, shorn of any pleadings that premised the plaintiff's claim on express or implied trust, the plaintiff was

precluded from mounting a case on the basis of any 'trust arrangement'. Secondly, it had been found on the facts that each of the nine payments made by the second defendant was based on separate instructions received from the first defendant and not with reference to any certificate and/or progress payments in respect of the project.

[37] On our part we have gone through the grounds of the judgment and also the documentary and oral evidence that were before the learned judge at the trial. The existence of the nine letters of instructions from the first defendant was part of the evidence tendered in court. We were not persuaded that the learned judge's findings of facts were perverse or not supported by the evidence. We were also not convinced that there had been any misdirection in law or error on the part of the learned judge in coming to the conclusion that court arrived at in this case.

[38] Turning now then to that part of the plaintiff's claim in the suit which centred on the Maybank performance guarantee, the plaintiff maintained in appeal that there had been a wrongful call or demand made by the second defendant on the Maybank performance guarantee since, in any event, the plaintiff had fully performed its part of the contractual obligations to complete the project.

[39] It was highlighted to us that witnesses for the second defendant had explained that the demand had been made more out of abundance caution and further the proceeds received had been handed over by the second defendant to the first defendant.

[40] More significantly, it was stressed to us, and before us counsel for the second defendant readily conceded the fact, that there had not been any demand by the government on the performance guarantee lodged with the government. Neither had there been any claim whatsoever by the government nor had any payments been made by the first defendant and/or the second defendant on account of non-performance of the project works contract or for any defective works arising therefrom.

[41] It was argued by the plaintiff that an obligation under a performance bond was only to such extent as to cover damages actually suffered arising from the impugned contracted works. The decision of the English Court of Appeal in *Cargill International SA and another v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461 was cited as authority for this proposition.

[42] In *Cargill*, Potter LJ had this to say:

> If questions of reasonableness are taken into account and if the usual characteristics and broad commercial purpose of performance bonds are borne in mind, it seems to me that the following matters are pertinent to the task of construction in the case. First, as Mr. Hossain accepted, such a bond is a guarantee of performance. That is not to say it is a guarantee in the sense that it has all the normal incidents of a contract of surety; it is of course a contract of primary liability so far as the bank that gives it is concerned. However, it has the feature that its purpose is to provide security to the buyer for the fulfilment by the seller of his contractual obligations: see Kerr J. In *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 149B. Second, its purpose is also that the buyer may have money in hand to meet any claim he has for damage as a result of the seller's breach. Third, it confers a considerable commercial advantage upon a buyer. Not only does the buyer have an unquestionably solvent source from which to claim compensation for a breach by the seller, at least to the extent of the bond, but payment can be obtained from the seller's bank on demand without proof of damage and without prejudice to any subsequent claim against the seller for a higher sum by way of damages. In these circumstances the obligation to account later to the seller, in respect of what turns out to be an overpayment, is a necessary corrective if a balance of commercial fairness is to be maintained between the parties.

Lord Staughton LJ had this to say in the same case:

> The general situation as to performance bonds is that they provide that the bank or other party giving the bond has to pay forthwith, usually on demand. But subsequently there has to be an accounting between the parties to the commercial contract.

[43] It was further submitted that the principle expounded in *Cargill* was adopted by the Singapore Court of Appeal in *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478 where the court held that since a performance bond was not an estimate of damages that might flow from a breach of contract but rather a guarantee of due performance of a contract, it would be implicit in the nature of such a bond that there would at some future stage be an accounting between the contracting parties in the event that payment was made under the bond. Any shortfall or excess between the full amount of the performance bond and any loss suffered by the party calling on the bond would therefore remain to be accounted for.

[44] In the circumstances, we were of the view that based on the concessions that there were no demands on the first defendant's performance bond given to the government and further there had not arisen any liability to pay damages to the government on account of the first defendant obligations in respect of the project works, the second defendant was not entitled to make any demand on the Maybank performance bond. Further since Maybank had paid out the sum of RM1,150,000 to the second defendant, and admittedly the second defendant had paid this amount to the first defendant, it followed that the

second defendant should be held accountable to the plaintiff to the extent of that amount that had been wrongfully demanded and paid out by the second defendant.

[45] Accordingly, having considered the respective submissions of counsel, we were unanimous that the following orders should be made in this appeal:

(a) the appeal against the order dismissing the appellant/plaintiff's application to amend the re-amended statement of claim is dismissed. The order of the High Court dated 5 December 2013 is affirmed;

(b) the appeal against the judgment of the High Court after full trial is allowed in part. The claim in prayer (2) of the statement of claim is allowed, that is, the respondent/second defendant having received the monies under the Maybank performance guarantee from Maybank shall pay or remit the sum of RM1,150,000 to the appellant/plaintiff. Judgment interest at the prevailing rate (5%pa) shall be paid on RM1,150,000 from the date of the High Court judgment, being 5 December 2013, until full realisation;

(c) the order of payment of cost of RM50,000 in the High Court is set aside. Costs of RM80,000 here and below is awarded to the appellant/plaintiff; and

(d) the deposit be refunded to the appellant/plaintiff.

Order accordingly.

Reported by Ashok Kumar